No. 10,739

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPRECKELS-ROSEKRANS INVESTMENT COMPANY (a corporation),
Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue of the United States for the First District of California,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

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BRIEF FOR APPELLEE.

OPINION BELOW.

The District Court did not file an opinion. Its findings of fact and conclusions of law are in the record at pages 69 to 71.

JURISDICTION.

This appeal involves income taxes for the year 1936 in the amount of $5370.56, plus interest. The taxes in controversy were paid to the appellee together with

other taxes for 1936 not in controversy on March 15, 1937; June 15, 1937; September 9, 1937, and December 23, 1937. (R. 11-12.) The claim for refund of $5,370.56, plus interest, was filed on March 13, 1940. (R. 21.) It was rejected on October 2, 1940. (R. 33.) This action for the recovery of the taxes under the provisions of Section 24, Fifth, of the Judicial Code, as amended, was instituted on September 17, 1942. (R. 2-7.) Judgment was entered for the appellee on December 18, 1943. (R. 72-73.) Notice of appeal was filed on March 7, 1944. (R. 73.) The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

In 1930, the taxpayer purchased 300 units of Chase National Bank—Chase Securities Corporation stock, a unit consisting of one share of the bank stock and one share of the securities affiliate stock. The price paid was the price per unit. Neither stock was quoted individually. Restrictions prevented the sale of either stock other than in units. These restrictions were removed in 1934. In 1936, the taxpayer sold the 300 shares of bank stock.

(a) May any part of the unit purchase price be allocated to the bank stock so as to enable the taxpayer to claim a loss in 1936; or

(b) Must the recognition of the loss be postponed until the securities affiliate stock, purchased as a unit with the bank stock, is sold;

(c) If allocation is permitted, is there any practical basis upon which allocation can be made?

STATUTES INVOLVED.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * * * *

(h) *Basis for Determining Loss.*—The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the adjusted basis provided in section 113 (b) for determining the loss from the sale or other disposition of property.

* * * * * * *

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * * * * *

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * * * *

STATEMENT.

In 1930, the taxpayer purchased 300 units of Chase National Bank—Chase Securities Corporation stock as follows: On March 3, 1930, 100 units at a cost of $17,050; on April 8, 1930, 100 units at a cost of $16,-546.25, and on April 24, 1930, 100 units at a cost of $17,100. (R. 17.) The 300 units thus cost $50,696.25.

Each unit consisted of one share of the stock of the Chase National Bank and one share of the stock of the Chase Securities Corporation. (R. 17.) The ownership of the securities was evidenced by instruments the opposite sides of which consisted of executed certificates of stock of each corporation together with legends stamped thereon referring to the original instruments and agreements pursuant to which the Chase Securities Corporation was organized. (R. 17-20.)

The Chase National Bank was organized in 1877. In 1917, it caused the Chase Securities Corporation to be organized for the purpose of dealing in securities with which the law prohibited the bank to deal. (R. 12.)

In connection with the organization of the securities affiliate, the bank caused a special dividend of $2,500,000 to be declared and transferred to the affiliate in return for the issuance by the affiliate of all its capital stock pro-rata to the stockholders of the bank. (R. 12.) The stockholders of the bank surrendered their stock certificates and in return received instruments with the certificates of stock in the bank and the securities corporation on opposite sides of the same paper. (R. 13.)

The agreement pursuant to which the securities company was organized provided that it could be modified, amended, or terminated by the vote of 75 percent of the shares of both the bank and the securities company. Later, the provision requiring a vote of 75

percent of the shareholders of each corporation was changed to 66 2/3 percent. (R. 13.)

Under the agreement pursuant to which the securities corporation was organized, the stock of the Chase National Bank and the stock of the Chase Securities Corporation could not be purchased or sold separately, but could only be sold in units consisting of one share of stock of each corporation. (R. 14.) Thus, until June 14, 1934, when this arrangement, as will appear below, was terminated, neither the stock of the Chase National Bank or the stock of the Chase Securities Corporation was quoted or sold separately. (R. 14.)

The quotations on the market with respect to the stock interests in the bank and the securities corporation was always in terms of a share of stock of the Chase National Bank. The bid for such a share of Chase National Bank stock constituted the price bid, asked or paid for a unit consisting of one share of the bank stock and one share of the securities corporation. (R. 14.)

As a consequence of the passage of the Federal Banking Act of 1933, requiring the separation of national banks from their securities affiliates, the arrangement subsisting between the bank and the securities corporation was terminated by an agreement dated June 14, 1934. (R. 16.) As part of the agreement, the certificate of incorporation of the Chase Securities Corporation was changed by eliminating therefrom all provisions preventing the separate sale or transfer of shares of stock without the transfer

of a like number of shares of the bank stock.[1] (R. 16.) The agreement also provided for the change of name to Amerex Holding Corporation.[2] (R. 17.)

On and after June 15, 1934, but not prior thereto, the stock of the securities corporation was quoted separately from the stock of the bank. (R. 17.)

For the period of June 1, 1934, to June 13, 1934, just prior to the removal of the restrictions on the separate sale of the stock, the bid quotation of units of the Chase National Bank—Chase Securities Corporation stock ranged from 27 to 28 3/4 and the asked quotation ranged from 28 1/2 to 30 1/4. (R. 14-15.) For the period of June 14, 1934, to June 30, 1934, that is, after the removal of the restriction, the bid quotations for the Chase Bank stock alone ranged from 26 to 27 1/2 and the asked quotations ranged from 27 1/2 to 29. (R. 15.) During this same period, the over-the-counter market showed bid quotations for the securities corporation stock[3] ranging from 13 1/2 to 14 3/4 and asked quotations ranging from 14 1/4 to 15 1/8. (R. 16.)

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[1]The agreement of June 14, 1934, also provided that the number of shares of the securities corporation was to be reduced so that each 10 shares of stock of the corporation then outstanding became only one share of the stock of the corporation. (R. 17.)

[2]For the sake of simplicity, the name Amerex Holding Corporation will not be further used in the brief, but the corporation will continue to be designated as Chase Securities Corporation or the securities corporation.

[3]Each share was the equivalent of ten shares prior to the agreement of June 14, 1934.

On December 22, 1936, the taxpayer sold its 300 shares of bank stock (but retained its securities company stock). (R. 21.) The taxpayer asserted a loss of $2,005.23 on said sale. (R. 21.) The taxpayer arrived at this amount by assigning[4] as a basis to the bank stock, 70 percent of the cost of the unit of Chase Bank—Chase Securities stock purchased by it in 1930, the remaining 30 percent being designated as the basis of the securities corporation stock (R. 5, 29), and subtracting from the basis of this bank stock the amount realized upon the sale of the same.[5] However, the asserted loss of $22,055.23 was not claimed as a deduction in the taxpayer's 1936 return (R. 12) and on March 13, 1940, the taxpayer filed a claim for refund in the sum of $5370.56 (R. 21) alleging that it is the amount of taxes overpaid for 1936 by reason of the failure to deduct the asserted loss of $22,005.23 in its 1936 tax return. The claim for refund was rejected on October 2, 1940. (R. 33.) This action was commenced on September 17, 1942, and was decided adversely to the taxpayer on December 13, 1943. (R. 71.)

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[4]The attempted allocation of basis was made after the sale of the bank stock. The record is silent as to any allocation made upon the books and records of the taxpayer at the time the units were purchased in 1930.

[5]$13,482.15. (R. 18.)

SUMMARY OF ARGUMENT.

The taxpayer made a single investment in units of Chase National Bank—Chase Securities Corporation stock. The price per unit was quoted as the price of Chase Bank stock. Acquisition of Chase Securities Corporation stock was merely an incident in the purchase of the bank stock. Neither stock could be purchased or sold separately until 1934 when the restriction against separate sale was removed. Since the shares were purchased in units as a single investment, no loss could be realized when the bank stock alone was sold. Gain or loss may be determined only when both stocks are sold.

Neither statutes nor regulations provide for the allocation of the cost of units of bank-securities affiliate stocks between the two. Since income taxation is statutory, this right does not exist and cannot be created by analogy. Even if the right to allocate did exist, there is no basis upon which allocation can be made in this case without resorting to guess work. By waiting until both stocks are sold, the exact amount of tax liability can be determined.

The question is not *whether* the taxpayer shall be allowed a loss, but *when* such loss may be claimed.

ARGUMENT.

I.

THE TAXPAYER MADE A SINGLE AND UNALLOCATED INVESTMENT IN CHASE NATIONAL BANK—CHASE SECURITIES CORPORATION STOCK AND NO LOSS IS REALIZABLE UNTIL BOTH ITEMS OF THE INVESTMENT ARE DISPOSED OF.

The ultimate question in this case is not *whether* the taxpayer shall be allowed the loss it now seeks to assert, but rather *when* that loss may be asserted. It is the position of the Government that, in every real sense, the taxpayer made but a single investment in the stock of the bank and its securities affiliate and that both must be disposed of before any loss may be recognized.

In 1930, when the taxpayer purchased his units of Chase Bank—Chase Securities stock, neither security was purchasable or transferable alone. In fact, the securities corporation stock was considered merely an incident in the ownership of the bank stock.[6] This is demonstrated by the fact that the price of a unit of one share of Chase Bank and one share of Chase Securities stock was quoted only in terms of one share of Chase Bank stock. (R. 14.) The acquisition of the securities stock was merely an incident in the purchase of the bank stock and the taxpayer did not contemplate mak-

[6] See testimony of Thomas C. Montgomery. (R. 61.)

ing two separate investments when the Chase Bank—Chase Securities stock was purchased in 1930.[7]

That the investing public should have considered the investment in Chase Bank stock a single investment in the bank and securities affiliate stock is logical and consistent with the history and purpose of the two corporations. The Chase National Bank was an old and well established institution. However, it was barred by law from dealing in certain securities. Hence, in 1917, Chase, like so many other banking institutions before and after that year, decided to take advantage of the securities market by organizing a securities affiliate, the profits of which would flow to the stockholders of the bank. To this end, the Chase Bank declared a special dividend of $2,500,000. This became the capital of the securities affiliate (R. 12), and the stock of the affiliate was issued pro rata and directly to the stockholders of the bank (on the opposite of the bank stock certificate). There was thus a unity of ownership and a unity of management. Even the dividends of the two corporations were paid as a unit.[8] Neither stock could be sold or transferred alone. In a very real and practical sense, the securities affiliate was a wholly owned, controlled and managed subsidiary of the Chase Bank.

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[7] In fact, as stated, the record is silent as to any allocation of investment between the two securities at the time of purchase on the books of the corporation or otherwise. Presumably, therefore, no such allocation was made.

[8] See testimony of Thomas C. Montgomery. (R. 43.)

This unity of interest and singleness of investment is demonstrated retrospectively when it is remembered that the "separation" occurred only because the Federal Banking Act of 1933[9] required national banks to divest themselves of their securities affiliates. In the case of the Chase Bank—Chase Securities affiliation, the net effect of the Banking Act of 1933 was to require the removal of the restriction against the separate sale or transfer of either stock. But there was nothing in the Banking Act which required the stockholders to divest themselves of either of the two stocks! Nothing in the Banking Act required a division of the investment! The single investment was not converted into a twin investment by the Act, nor did the taxpayer sell its bank stock immediately upon the removal of the restriction against separate sale. The investment was single when originally made and continues single until both stocks are disposed of.

In *De Coppet v. Helvering,* 108 F. (2d) 787 (C.C.A. 2), certiorari denied, 310 U.S. 646, the Court had under consideration an appeal from the Board of Tax Appeals decision involving a bank and securities affiliate similar to those involved in this case. The Court held the investment to be single and refused to permit loss to be realized when the value of the securities affiliate shares become extinct but held that loss would be realized only when the full investment was disposed of. The Court said (pp. 788-789):

> Hence it would certainly have made a great difference how the investment shares were held,

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[9] c. 89, 48 Stat. 162.

if they were not locked to the bank shares. But they were; it was impossible to sell them without selling the bank shares, or to sell the bank shares without selling them. We do not say that no differences can be conjured up between the legal form chosen and the usual share holding of a subsidiary; but they are immaterial to the subject at hand. The beneficial interest was as much an appurtenance of the bank shares as an easement is of the servient tenements; it merely gave them an added value, precisely as it would have done, had the Bank been the shareholder. Collectively the same persons must always be equitable owners of the investment shares and shareholders of the Bank, and in the same proportion; there never could be one group holding bank shares, and another holding investment shares. So far as a corporation is the aggregate of its shareholders in respect to their collective rights and obligations, there was but one corporation.

* * * * * * *

The important matter is not what formal legal differences there were between the model adopted and the ordinary case of a corporate subsidiary; but whether the investment was single. It was if the investor could not have dealt with the parts separately; and these investors could not. When we speak of an investment, we do not think of the various ventures in which the company may be engaged, or of the various properties it may hold. We think of the unity which we must deal with as such, regardless of the particular legal paraphernalia in which it is clad. It is from that background that section 23 (e) (2) speaks, and the Board was right in holding that here there was but a single investment.

In *Commissioner v. Hagerman,* 102 F. (2d) 281 (C.C.A. 3), affirming the decision of the Board of Tax Appeals, 34 B.T.A. 1158, wherein apportionment of cost between the bank and securities affiliate shares was permitted, and upon which the taxpayer relies very heavily in this case, practically no consideration was given to the question of the singleness of the investment, and hence the case can not be regarded as authority with respect to the issue under discussion. See *United States v. Mitchell,* 271 U.S. 9. In fact the Second Circuit, in the *De Coppet* case, *supra,* expressly stated (p. 789) that it does not regard the *Hagerman* decision as authoritative.

In light of the foregoing discussion, it is evident that the taxpayer seeks to break a single investment into two investments for the purpose of avoiding taxes in the year in question. Courts have often held that a single transaction may not be broken up into various elements to avoid a tax. Cf. *Moore v. N.Y. Cotton Exchange,* 270 U.S. 593; *Du Pont v. Deputy,* 23 F. Supp. 33 (Del.).

The trial judge was entirely correct when he held that the taxpayer's investment was single and that no loss is allowable until both stocks are sold. (R. 70-71.) Moreover, the taxpayer will not be injured by waiting until he disposes of his securities corporation stock in order to determine precisely the amount of gain or loss upon the closed and completed transaction. Waiting will eliminate the necessity for determining the tax liability through the use of artificial or fictitious values and will result in accurate and precise

computation. *Pierce v. United States,* 49 F. Supp. 324 (C. Cls.). As stated earlier, the question is not *whether* the taxpayer shall be allowed his loss, but *when! Moore v. Hoey,* 31 F. Supp. 478 (S.D.N.Y.).

II.

NO LOSS IS ALLOWABLE ON THE SALE OF THE BANK STOCK BECAUSE THE COST BASIS CANNOT BE APPORTIONED BETWEEN THE BANK AND THE SECURITIES CORPORATION STOCK.

Section 23 (f) of the Revenue Act of 1936, *supra,* authorizes deductions of losses sustained by corporations and subdivision (h) of that section provides that the basis for determining the amount of the deduction should be the adjusted basis provided in Section 113 (b), *supra,* for determining gain or loss upon the sale or other disposition of property. Section 113 (b) provides that the adjusted basis shall be the basis under subdivision (a) of that section with certain adjustments, and subdivision (a) provides that the basis shall be cost with certain exceptions.

There is no specific provision in the Revenue Act of 1936 or in the Treasury Regulations promulgated thereunder which authorizes apportionment of the cost basis in a case such as the present one. Since the law of income taxation is entirely statutory, the taxpayer recognizes that it is hard put to establish a legal right to apportionment and, therefore, resorts to an argument based on analogy. (Br. 12-17.) The taxpayer contends that because apportionment is required or permitted by statute or regulations in cer-

tain situations, apportionment should be permitted here.

The principle of creating rights or liabilities in a given federal tax situation not covered by statute by relying on the law governing similar but not the identical situation was rejected by the Third Circuit Court of Appeals in *Commissioner v. Douglas,* decided on July 10, 1944 (1944 P-H, par. 62,648). In this case it was argued that an attempt was being made to import into an estate tax situation the law relating to income tax liability applicable to similar facts. The Court said:

> To impose liability we should have to transfer the case law on the concept of constructive receipt, which has grown up under the different terminology of section 167 of the income tax law, over to section 302 (c) of the estate tax law. The suggestion has a certain smooth plausibility. If the fruit can be taxed to the settlor as income, why may not the tree be taxed to his estate? The answer is that Congress has imposed liability for estate tax and income tax in different language. * * * If this addition to the tax law is to be made, the Congress, not the courts should make it.

Thus, the fact that the regulations[10] provide for the apportionment of cost between depreciable and non-depreciable assets acquired for a lump sum (Br. 12), or permit[11] apportionment where two different

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[10]Treasury Regulations 111, promulgated under the Internal Revenue Code, Section 29.23 (1)-4.

[11]Treasury Regulations 62, promulgated under the Revenue Act of 1921, Article 1567; also, Section 113 (a) (6), Internal Revenue Code.

kinds of property are acquired in a tax free exchange (Br. 13),[12] or permit apportionment where common stock is received as a bonus[13] (Br. 15), or permit apportionment where real estate is purchased for the purpose of subdividing into lots[14] (Br. 16), or permit apportionment of discovery value between land and natural resources[15] (Br. 16), or permit allocation of cost of production of different products produced by a single process[16] (Br. 17) is hardly a reason for permitting an artificial severance of a single investment into its elements where no statute or

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[12]The quoted portion of Article 1567, Regulations 62, omits the very significant language preceding the part quoted, to wit:

> If no fair apportionment is practicable, no profit on any subsequent sale of any part of the property received in exchange is realized until out of the proceeds of sale shall have been recovered the entire cost of the original property.

Thus, even though apportionment is permitted in principle, it must be demonstrated that it is practicable. Moreover, *Curtiss v. Commissioner,* 21 B.T.A. 629, affirmed, 57 F. (2d) 847 (C.C.A. 5th), cited on page 13 of the taxpayer's brief, in which the regulation was applied, is totally different from this case because the *Curtiss* case, *supra,* involved an exchange of securities of different types. In this case, there was no exchange. All that occurred was that the restriction against the separate sale of the stocks was removed.

[13]Treasury Regulations 111, Section 29.22 (a)-8. Here, too, while apportionment is permitted, it must also be practical.

[14]Treasury Regulations 111, Section 29.22 (a)-11.

[15]Treasury Regulations 111, Section 29.23 (m)-3; Section 29.23 (m)-27.

[16]Treasury Regulations 111, Sec. 29.22 (c)-7.

regulation gives the taxpayer the right. Each of the instances in which apportionment or allocation is permitted by statute or regulation involves a situation quite different from that of a single investment in two inseparable stocks. Thus, even if the right to apportionment could be predicated upon analogy—and it can not—the analogies are weak indeed!

Assuming for the sake of argument that the statutes or regulations permitted apportionment, the very difficult problem of affecting an apportionment of the single investment arises. This practical difficulty is silhouetted by the inconsistent position taken by the taxpayer with respect to what a proper allocation of the cost should be. In the taxpayer's claim for refund (R. 22-23) and in the complaint (R. 2-7), an allocation on the basis of 70 per cent for the bank stock and 30 per cent for the securities affiliate is urged, and the amount of taxes claimed as a refund is computed on this basis. But the taxpayer's expert witness, Thomas C. Montgomery, testified (R. 62) that the allocation should be 75 per cent to the bank stock and 25 per cent to the securities affiliate, and the taxpayer in its brief (p. 38) adopts this allocation, and presumably chooses to forget about the 70-30 per cent allocation upon which the claim for refund was founded and the complaint based.[17] The taxpayer's brief refers (pp. 39-40) to this change in allocation in a rather off-hand manner. Presumably, the inconsistency is too dangerous to the taxpayer's position to dwell upon!

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[17]The taxpayer has not amended its complaint or recomputed the amount of taxes claimed as a refund.

The situation is analogous to that in *Pierce v. United States,* 49 F. Supp. 324 (C. Cls.), involving the identical question presented in this case where the Court said (p. 330):

> * * * plaintiffs' witness suggested values widely different from those arrived at by the plaintiffs' other method. Either of these methods seems plausible to us, as a rough guess at a value that might be attributed. But we do not think that the situation calls for such a rough estimate, when by patience the exact answer may be obtained. * * *

Not only do the conflicting formulae for allocation submitted by the taxpayer indicate the impracticability of equitably allocating the cost between the two stocks, but an examination of each individual proposal for allocation indicates that they are based upon guess work.

The method used in arriving at the 70-30 percent allocation is set forth in the claim for refund. (R. 22-33.) It revolves about a comparison of the net worths of the bank and the securities affiliate as of December 31, 1929, and a comparison of the earnings of the bank and the securities corporation for the period 1924 to 1929. But information as to 1929 or prior years can have little bearing upon values in 1930 when the taxpayer purchased his Chase Bank—Chase Securities stock. The Court will take judicial notice of the fact that the market broke in 1929, that values crashed and earnings declined precipitously, that 1930 was the beginning of a period of complete demoralization in the securities field. In view of the

financial chaos which broke upon the nation in the fall of 1929, no standard of comparison applicable to the prosperous years prior to 1929 can be valid for 1930. This is particularly true when it is remembered that the securities affiliate, by reason of the fact that it dealt solely in securities, no doubt suffered proportionately much greater losses in 1930 than the bank.

If the comparative earnings statement (R. 31) is examined, a greater fluctuation in comparative percentages for the years 1924 to 1929 is revealed. In view of such fluctuations, an average is hardly a fair indication of potential or comparative earnings. For 1929, the year most proximate to that in which the taxpayer purchased the Chase Bank—Chase Securities stock, the comparative earnings are given as 76.013 percent to the bank and 23.989 percent to the securities company, and yet, for 1930, the taxpayer ascribes an allocation of value of 70-30 percent. This is a *non-sequitur;* it is sheer guess work.

Because of the financial history of 1929 and 1930, a comparison of net worths as of December 31, 1929, is illusory and deceptive. Only a detailed statement showing all the items in the balance sheet valued at their then market value, would enable a correct computation of net worth.[18] Such an analysis was not made by the taxpayer. The net worth statements used

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[18]It is well known that book values are often arbitrary, and bear but slight relation to the facts. Book value and market value are therefore not necessarily synonymous. 10 Mertens, Law of Federal Income Taxation, Section 59.14, p. 467.

for comparative purposes were those published as of December 31, 1929. It is generally recognized that published statements of banks and other corporations seldom provide sufficient information upon which to base an intelligent opinion of value, and this would be particularly true of a securities corporation statement published on December 31, 1929.

The testimony of Thomas C. Montgomery and the basis of the allocation made by him is subject to the foregoing as well as additional weaknesses. He admits that the investor "was buying a unit and he was paying more attention to Chase Bank than he was to the securities company". (R. 61.) He admits that his allocation may not be mathematically exact. (R. 58.) He predicated his estimate of comparative values on the book values of the respective stocks as of December 31, 1929, and December 31, 1930 (R. 42), and upon the dividend records of the bank and the securities affiliate. (R. 43.) The proportionate percentage of the book value of the securities corporation was 31 percent at the end of 1929 and 23 percent at the end of 1930. (R. 42.) He did not know whether the book values of the securities owned reflected market values, but assumed so. (R. 55.) He had no information proximate to the three dates in 1930 when the taxpayer made his purchases. (R. 56-57.) He admitted that if information were available as of the dates of purchase, a different allocation might be necessary. (R. 57.)

The bank itself issued no statement of earnings, but financial services published what in their opinions

constituted statements of earnings. (R. 51.) However, no statement of the bank's earnings for 1930 were published because a merger involving the bank prevented ascertainment of the earnings. (R. 51.) The actual earnings of the securities company were less than the dividends paid, and Montgomery thought the difference was paid out of surplus but was not sure. (R. 52.)

Nothing in Montgomery's testimony indicates that he took into consideration the deflation that occurred after 1929. Montgomery also did not take into consideration, in making the allocation, the fact that it was the tie-up with the Chase Bank that gave real value to Chase Securities Corporation stock, although he admitted that it was a great factor in determining the value of the unit. (R. 60, 61.)

Montgomery also admitted that any attempt to allocate market values to the separate stocks in 1930 was highly theoretical because there was no separate market for each stock in 1930. (R. 62.)

All in all, a fair reading of Montgomery's testimony shows that he was guessing.[19] The result of his guess was different from that upon which the taxpayer has predicated its case. Income taxation is more than a matter of guessing. Moreover, there is

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[19]Opinion evidence, even if not contradicted, is not necessarily conclusive. The facts upon which the opinion is based must corroborate the opinion. See *Joseph S. Wells Ass'n v. Helvering*, 71 F. (2d) 977 (App. D.C.); *Balaban & Katz Corp. v. Commissioner*, 30 F. (2d) 807 (C.C.A. 7th); *Dayton P. & L. Co. v. Comm'n*, 292 U. S. 290.

no need to guess in this case where by a little patience, by waiting until both stocks are sold, the exact gain or loss will be known and the proper tax liability determined.

The great weakness in the taxpayer's position is that it seeks to establish a fair market value for securities that could not have any separate market values, since neither stock could be sold separately. Where an effort is made to establish the intrinsic value of stock, the same value cannot be ascribed to restricted stock as to stock which can freely be disposed of by its owner. See *Helvering v. Tex-Penn Co.,* 300 U.S. 481, affirming 83 F. (2d) 518 (C.C.A. 3); *Propper v. Commissioner,* 89 F. (2d) 617 (C.C.A. 2); *Schuh Trading Co. v. Commissioner,* 95 F. (2d) 404 (C.C.A. 7); *Hudson Motor Car Co. v. United States,* 3 F. Supp. 834.[20] In those cases where it has been held practical to allocate a basis between two kinds of property, such allocation has been made according to the respective market values of the

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[20]See concurring opinion in which it is stated (p. 147):

> I concur with the foregoing opinion that the stock delivered to the employees had no fair market value or in fact any market value at all, because it could not be sold in the market without giving the company an opportunity to purchase it at much less than the regular market price. When we speak of the market value of the stock, we mean the selling price of stock upon which there are no restrictions as to sale. Nor do I think that the plaintiff is entitled to a deduction in the amount of the book value of the stock, for the book value is not a measure of actual value.

properties at the critical dates and where the properties were such that each had an independent market value. See *Taylor v. Commissioner,* 70 F. (2d) 619 (C.C.A. 2), affirmed, 293 U.S. 507; *Houghton v. Commissioner,* 71 F. (2d) 656 (C.C.A. 2), certiorari denied, 293 U.S. 608; *Curtiss v. Commissioner,* 57 F. (2d) 847 (C.C.A. 5); *Salvage v. Commissioner,* 76 F. (2d) 112 (C.C.A. 2), affirmed, 297 U.S. 106. In the present case, since neither stock could be disposed of separately, neither could have a market value.

Because of the difficulties of apportionment and the problems involved, the weight of authority is that apportionment is not permitted where bank stock and securities affiliate stock or interests are purchased as an inseparable unit. *De Coppet v. Helvering,* 108 F. (2d) 787 (C.C.A. 2); *Wise v. Commissioner,* 109 F. (2d) 614 (C.C.A. 3); *Pierce v. United States,* 49 F. Supp. 324 (C. Cls.); *Moore v. Hoey,* 31 F. Supp. 478 (S.D.N.Y.); *Barber Securities Corp. v. Commissioner,* 45 B.T.A. 521; *Orvilletta, Inc. v. Commissioner,* 47 B.T.A. 10.

The only case cited by the taxpayer in which apportionment was permitted with respect to the cost of bank and securities affiliate stock is *Hagerman v. Commissioner,* 34 B.T.A. 1158, affirmed, 102 F. (2d) 281 (C.C.A. 3). The Circuit Court affirmed on the basis of the Board's decision.

The taxpayer, in its brief, has tried to distinguish the *Hagerman* case, *supra,* from the other cases and show that the *Hagerman* principle of apportionment would have been applicable in the other cases if the

proof had been the same. It is submitted, however, that a fair reading of all of the cases does not permit a distinction upon any substantial basis. The Second Circuit in the *De Coppet* case, *supra,* was unable to distinguish between the issues involved in the *Hagerman* and *De Coppet* cases, *supra,* and its comments on this point are most persuasive (p. 789):

> In *Hagerman v. Commissioner,* 34 B.T.A. 1158, affirmed 3 Cir., 102 F. 2d 281, the facts were not quite the same, though near enough to be a precedent if either tribunal consciously meant to decide the point. It is somewhat difficult to know whether that was the case; the discussion turned chiefly upon whether it was "practicable" to ascertain the "basis" of the exchange, though the opinion of the minority certainly skirted very close to what we are deciding. The majority opinion of the Board here attempted to distinguish the case on the ground that the two interests were severed by an exchange; but we cannot agree that that was vital. Unless the shareholder's interest in the quasi-subsidiary was separate before its dissolution in the sense that a true subsidiary's is not; that is, unless there had always been two investments, the exchange could not have "realized" a loss. Since it was held to have done so, the case can be distinguished, if at all, only because the point was not mooted. In any event, however understood, we do not regard the decision as authoritative.

Similarly the Court in *Pierce v. United States, supra,* was unable to see the distinction and said (pp. 330-331):

> The then Board of Tax Appeals, now the Tax Court of the United States, in *Hagerman v. Commissioner,* 34 B.T.A. 1158, reached a conclusion opposite to ours, and its decision was affirmed by the Circuit Court of Appeals for the Third Circuit, 102 F. 2d 281. But the Board in the *De Coppet* case, 38 B.T.A. 1381, and the Circuit Court of Appeals for the Third Circuit in reviewing one of the cases consolidated, in the Board proceeding, with the *De Coppet* case, held as we hold, that apportionment was not practicable and no deductible loss could be taken. *Wise v. Commissioner,* 3 Cir., 109 F. 2d 614. Both the Board and the Court said that the *Hagerman* case, *supra,* was distinguishable, but we do not see any material distinction.

It thus appears that the *Hagerman* case, *supra,* upon which the taxpayer relies so heavily, stands alone. As the same issue was involved in all the bank—securities affiliate cases cited above, it seems clear that the decision of the Board of Tax Appeals in the *Hagerman* case, *supra,* was not sufficiently elastic to apply to all taxpayers similarly situated. On the other hand, the rule adopted in all the other cases, namely, to hold in suspension the determination of gain or loss until disposition has been made of the entire unit, would result in the same treatment being accorded all taxpayers in a similar situation and permit a precise determination of the gain realized or loss sustained upon the complete transaction.[21]

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[21]At the conclusion of taxpayer's brief it is suggested that perhaps the proper date for apportionment is June 14, 1934, when the inseparable character of the unit is terminated. It is conceded, however, by

CONCLUSION.

It is submitted that the Commissioner was correct in refusing to permit apportionment of the single investment in units of Chase Bank—Chase Securities Corporation stock and the District Court was likewise correct in adopting a similar position. The judgment of the District Court should therefore be affirmed.

Dated, August 16, 1944.

Respectfully submitted,

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the taxpayer (Br. 42) that the more logical date is the date of purchase. Since basis for determining gain or loss involves cost, if apportionment were permitted, it would have to be an apportionment of cost. Moreover, this suggested alternative date for apportionment is raised for the first time now on appeal. It was not presented in the claim for refund or in the Court below and hence cannot be considered here.